BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia will be found beginning at page 167 of the record herein. It has not as yet been officially reported.

JURISDICTION.

The decision of the United States Court of Appeals for the District of Columbia was rendered on October 11, 1943. The jurisdiction of this Court is based on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. A., Sec. 347(a).

QUESTIONS PRESENTED.

The questions presented are stated in the petition (*supra*, p. 10).

SPECIFICATION OF ERRORS.

(1) The United States Court of Appeals for the District of Columbia erred in failing to consider and in denying petitioners' motion to dismiss the appeals of Rollins College, the University of North Carolina, and Olds and the American Security and Trust Company, as executors and trustees under the last will and testament of William Hayes Ackland, deceased.

(2) Said United States Court of Appeals erred in holding that the doctrine of *cy pres* is in force in the District of Columbia.

(3) Said United States Court of Appeals for the District of Columbia erred in holding that the last will and testament of William Hayes Ackland showed the testator had a general charitable intent as distinguished from an intention to give his residuary estate to a specific institution for

a specific purpose and in holding that the doctrine of *cy pres* was applicable in the case at bar.

(4) The United States Court of Appeals for the District of Columbia erred in considering a former Will of the testator, declarations of the testator made during his lifetime, letters written by the testator to officials of Duke University, and other extrinsic evidence and in predicating its opinion that testator had a general charitable intent upon such extrinsic evidence.

(5) The court erred in reversing the decision of the District Court.

ARGUMENT.

I. The Court Below Erred in Ignoring the Challenge to Its Jurisdiction.

The court below has adopted the novel, and we submit, erroneous view that a motion directed against its jurisdiction to hear an appeal need not be considered if it finds against the moving party on the merits. In substance, the court below has held that, notwithstanding an attack on its jurisdiction made at the outset of the proceedings, it may proceed to a full consideration of the merits of the appeal and find against petitioners on the merits without considering, in the first place, whether or not it has jurisdiction to entertain the appeal.

The District Court had ruled that the will of William Hayes Ackland created a valid charitable trust but that since Duke University, the beneficiary thereof, had renounced, the trust had failed, and there arose a resulting trust for the benefit of the next of kin of the testator. In so holding that court found that the trust could not be administered *cy pres*. Three parties filed appeals in the court below from this part of the decision. They all three contended that the *cy pres* doctrine was in force in the District of Columbia, and being in force, should be applied in the instant case. Those appealing on this basis were the execu-

tors and trustees named in the will, the University of North Carolina and Rollins College.

Your petitioners thereupon filed motions to dismiss these appeals on the ground that the parties appellant were not aggrieved parties within the meaning of Title 17, Section 101 of the D. C. Code and, therefore, the court was without jurisdiction to entertain the appeals. In the preliminary statement contained in their brief in support of the motion to dismiss your petitioners stated:

"As this motion goes directly to the fundamental question of this Honorable Court's jurisdiction to consider these three appeals, it is respectfully submitted that justice would be served and the administration of the estate expedited by consideration and disposition of this motion *in limine*". (R. 101)

The rules of the court below (Rule 31(j)) provide that no oral argument will be permitted on motions unless otherwise directed by the court. The court below did not at any time direct argument on the aforesaid motion to dismiss and, consequently, the motion has never been argued.

The first and only acknowledgement of the motion to dismiss will be found in the next to the last paragraph of the decision of the court below. After fully considering, weighing and deciding all issues pertaining to the merits of the cause and the appeals to which the motion to dismiss was directed, the court makes this singular reference to the motion to dismiss:

"Jeannette A. Noel et al. filed a motion to dismiss all the appeals, except their own. Action upon this motion was postponed until the case could be heard upon its merits. *In view of our conclusion that the judgment of the District Court must be reversed, the motion is denied and the cause remanded with instructions to proceed in accordance with the opinion.*" (Italics supplied) (R. 175)

It is fundamental that the question of a court's jurisdiction to entertain an appeal must be met on the threshold,

and where attack is made the matter must be disposed of in favor of the court's jurisdiction before a court may, with any color of right, consider the issues pertaining to the merits of the cause. This would seem so clear as to make argument frivolous. Certainly where a challenge to a court's jurisdiction has been squarely and properly made, the court must dispose of the question, before it may entertain the cause on its merits.

These fundamentals have been completely ignored by the court below and since the question of an appellate court's jurisdiction is so vital to the integrity of our judicial system, for this reason alone, this Honorable Court should grant the writ here sought.

II. Had the Court Below Considered the Motion to Dismiss, it Should Have Granted the Same.

Attached to the printed motion to dismiss, which appears at page 99 of the Record, is the brief filed in support thereof.

The substance of the argument advanced in the court below and reasserted here is that the three parties who appealed the decision of the trial court holding the doctrine of *cy pres* inapplicable to the case at bar were clearly not parties aggrieved by that decision within the legal definition of that term.

It is clear that Olds and the Trust Company, as executors and trustees, were not aggrieved by the trial court's decision which merely ordered the payment of the fund renounced by the named beneficiary to the next of kin of the testator. As representatives of the estate of the decedent, their powers, duties and privileges must flow from the instrument which they have been designated to administer. Their position should be a neutral one. They are not charged with the duty nor do they have the power to represent the public generally or to advocate their own particular and individual views of public interest.

Neither the University of North Carolina nor Rollins College would have any claim to the fund as a matter of right even though it was clear that this was a proper case for the application of the *cy pres* doctrine. Neither institution was named as an alternate beneficiary in the will of the testator and had no more standing in the court below than would the University of Texas, the University of Southern California, or any other college or university in the United States.

We submit that it is apparent that the jurisdiction of the court to consider the appeals was a serious one and was appropriately brought to the court's attention at the outset, and we respectfully urge that the court's action in the first place in deciding the merits without consideration of the motion was a grievous error and that, in the second place, had it given the motion the consideration it merited, it should have found for the petitioners.

III. The Court's Treatment of the Question: Whether or Not the Cy Press Doctrine is in Force in the District of Columbia.

We submit that substantial error warranting the granting of the writ exists, in view of the action of the court below in holding that the doctrine of *cy pres* exists in the District of Columbia.

The *cy pres* doctrine is not one of uniform application in the United States as it is in England. The doctrine of judicial *cy pres*, originating in England, migrated here, to be used by some of the States and rejected by others. The District of Columbia has been considered one of those jurisdictions in which the doctrine was not in force (See 2 Bogert, Trusts and Trustees, 1297). In 1929, in the case of *Graff* v. *Wallace*, 59 App. D. C. 64, 32 Fed. 2d 960, the court below reaffirmed the general understanding that had existed prior to that time in the District of Columbia and flatly held that the doctrine was not in force there. The trial court in the instant case unhesitatingly ruled that its hands were tied because it was the settled rule, by which it

was bound that the *cy pres* doctrine was inapplicable. Notwithstanding this, the court below reached the amazing conclusion that it has never been denied that the doctrine was applicable in the District. The Court said: "*That the doctrine of judicial cy pres is applicable in the District of Columbia has never been denied.* * * *"

In its opinion below the court examined *Graff* v. *Wallace, supra*, and stated that the language used was *obiter dictum* and, in any event, related not to judicial *cy pres* but prerogative *cy pres*. At the outset, even though it were conceded that the language constituted *obiter dictum*, it is difficult to understand how the court could have stated that it has never been denied that the doctrine was applicable in the District of Columbia. That which the court had before it in the *Graff* case involved the question of the exercise of *judicial cy pres* and, by no reasoning, can it be said that prerogative *cy pres* was the subject of the court's decision. In that case the testator established a trust, the income from which was to be used to create and maintain a hospital for the care of crippled children in the District of Columbia. Counsel supporting the trust had contended in the lower court that under any circumstances the trust should not fail but that the income, if insufficient for a hospital, could be used to maintain a ward in an already existing hospital. The trial court suggested it might have power to direct its use for that related purpose. The District Court of Appeals held the provisions of the trust could be carried out and that the accumulations did not violate the rule against perpetuities. It then treated with great detail the suggestion made, that, even if a hospital could not be established out of the fund, the court could direct the use of the fund by some other existing hospital. The court said:

> "It, however, is intimated by counsel for appellees that if the conditions should at any time require, the equity court would have inherent power to so modify details of the testator's plan for carrying his charita-

ble purpose into execution as to make it practicable and thereby prevent intestacy. Counsel suggest in their brief that: 'If a fund bequeathed to maintain a hospital is not sufficient for that purpose, a court of equity may direct that a ward in an existing hospital be supported from the testator's bounty.' And the learned justice below, in his opinion, suggested that: 'If it should later appear that the income alone should not be sufficient, if accumulated for a reasonable time, to accomplish the purposes of the testator in the particular manner prescribed by him, I think that the court, upon proper proceedings, would have the power to have the same charitable purposes carried out in some more practicable manner.' "

And, dealing specifically with the question of judicial *cy pres* to be exercised by the lower court, the Court of Appeals said:

"The present bequest calls for the establishment of a charitable institution, a hospital bearing the name of the testator; and the creation of a fund is provided from the income of the estate to be expended by the trustees for the care of patients therein. Any diversion of the fund to a use not contemplated by the testator, such as keeping patients in a ward of an established hospital, would constitute an unlawful discharge of the trust, and the application of the fund to a purpose not intended or contemplated by the testator. Such a disposition of the income would prevent the accumulation of a fund for the establishment and maintenance of a hospital and thereby defeat the chief object the testator had in mind. *The provisions of the will are explicit, and the fund created can only be appropriated under the trust to the erection and maintenance of a hospital.*" (Italics supplied)

Only through the use of the most forced reasoning can it be said that the court below in the *Graff* case was dealing with prerogative *cy pres* and not judicial *cy pres*. That which was suggested to the court was that the trial court should direct that a fund given for the erection of a hospital

be diverted to the support of a room or a ward in an existing hospital "as the next best thing". This is the application of judicial *cy pres* in its purest form.

It is respectfully submitted that the finding by the court below that the doctrine is in existence in the District of Columbia and indeed that its existence has never been questioned is contrary to law and fact. If it were deemed desirable at this time to adopt the principle of *cy pres* for this jurisdiction, it would seem that the only proper way to accomplish this result would be through the enactment of legislation by Congress acting for the District of Columbia rather than by the process of judicial interpretation at this late date.

If this were done, the Attorney General of the United States, or some other government official would be charged with the responsibility of representing the public interest, as is the case in all States where the doctrine is in force. It is significant that Congress has never designated any officer of the Federal government or the District of Columbia to represent the public in cases when there is a failure of a charitable trust in the District. The non-existence of the doctrine of *cy pres* has been a rule of property in this jurisdiction and has controlled the passage and distribution of property for more than a century. It should not, we submit, be disturbed without action from the legislature.

IV. The Decision Below Creates Serious Uncertainty and Confusion as to the Admissibility of Extraneous Evidence Where the Will is Clear and Unambiguous.

Mr. Ackland's will was conceded by all parties to be clear and unambiguous. The court below makes no finding that ambiguity, either latent or patent, exists. Under such facts, the prevailing law of the District of Columbia and of this Court is that extraneous evidence may not be considered but that the intent of the testator, as expressed by him in his will, controls. (*Association of Survivors of 7th*

Ga. Regiment v. *Larner*, 55 App. D. C. 156, 3 F. (2nd) 201; *Brown* v. *Wells*, 45 App. D. C. 428; *Crenshaw* v. *McCormick*, 19 App. D. C. 494; *In re Vanderhurt* v. *Anderhursh*, 171 Cal. 553, 154 P. 5; *Eneri* v. *Haven*, 67 N. H. 503, 35 A. 940; *Wilkins* v. *Allen*, 13 Howard 385, 15 (L. Ed.) 396).

In complete disregard of this well established principle of law, the court below, without any explanation or attempted justification, proceeded in the most minute detail to examine, consider and weigh every discernible shred of extraneous evidence contained either in the pleadings of the parties, exhibits filed and, indeed, even facts or conclusions that were personally known to or gleaned by the court from information or sources not disclosed in the opinion.

In face of the fact that no ambiguity was alleged to exist, and in utter disregard of its own well established rule of law and the rule of this Court, the court below, without once meeting the issue or explaining why it chose to disregard or ignore settled principles of law, found, considered and, to a substantial extent, grounded its decision upon such evidence as: (1) a former and revoked will of the testator not in issue; (2) letters written by the testator to three different universities after the execution of the revoked will and before the execution of the will in issue; (3) alleged interviews and correspondence between the testator and Dr. Few, then President of Duke University; (4) oral and written assurances alleged to have been made by Dr. Few concerning the testator's plans; (5) a set of plans not filed with the will for probate or treated as a part of the will by the executors when they applied for appointment; and (6) numerous other evidentiary matters outside the will of the testator.

As a result, the court below concluded (1) that the testator had a heartfelt interest in the cause of art in the South; (2) that Dr. Few, President of Duke University, had been engaging in blandishments in his dealings with the testator and was attempting, for reasons which the Court said were

not clear to it, to persuade the testator to make an *inter vivos* gift to Duke University instead of a testamentary trust; (3) that because of those blandishments testator did not provide for the disposition of his estate in the contingency that arose, namely, the renunciation of Duke; (4) that the paramount, dominant and primary purpose of the testator was to give to charity generally and that his motive or desire to perpetuate his name by the inclusion of an apse and recumbent statue was minor or insignificant compared to the larger purpose; (5) that Duke University had "repented * * * the blandishments practiced upon William Hayes Ackland during his life time * * *"; (6) that the functions of the beneficiary under the testator's will "could be as well *or better* performed by other universities"; (7) and what testator would have wished and what his intention would have been had considered the fact that Duke might not accept his gift.

The court below made all of these findings, and many others, most of which are fundamental to its final conclusion that a general charitable intent existed in the mind of the testator as distinguished from his will, and, consequently, the trust may be administered *cy pres*. We respectfully submit that not one of these conclusions can be reached from an examination and study of the testator's will. Certainly the will does not bespeak blandishments "practiced" by Dr. Few of Duke University on the testator.

V. Courts Cannot Speculate as to What a Testator Would Have Done or Guess at What Provision Testator Probably Might Have Made if He had Considered and Provided for a Certain Contingency.

The court below apparently recognized the proposition that even in those jurisdictions where the *cy pres* doctrine has been held to apply, the doctrine cannot be used except in cases where the testator in his will expresses a general charitable intent. In its opinion, however, the court below does not state that it found such an intent from the testa-

tor's will, it merely says "the dominant idea *in the mind* of the testator was the cause of art in the South". It speaks of what "testator would have wished" and what his "intention would have been" had he made provision for the event that occurred, the renunciation of Duke. It ignores completely the rule that where a gift is made to a particular institution for a particular purpose, the doctrine may not be employed. Both rules are exceptionally well stated in a recent case[1] wherein the court said:

> " * * * There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect. If that mode fails, the court says the general purpose of the charity shall be carried out. There is another class in which the testator shows an intention, not of general charity, but to give to some particular institution, and then if it fails because there is no such institution, the gift does not go to charity generally. That distinction is clearly recognized, and it cannot be said that wherever a gift for any charitable purpose fails it is nevertheless to go to charity' ".

It is improper for a court to speculate as to what testator's intention would have been had he contemplated the event which actually occurred. It would have been such a simple matter for testator to have chosen an alternate beneficiary had he wanted one in the event that Duke did not accept his gift. If he had a general charitable intent to further the cause of art in the South, it would have been so easy for him to have said so in his will. He did not do so, and now we find the court below supplying his wishes, determining what was in his mind, and finding what his intention would have been had he expressed it.

In the very recent case of *Chicago Daily News Fresh Air Fund* v. *Kerner*, (1940) 305 Ill. App. 237, 27 N. E. (2d) 310, the court had under consideration an almost identical set of facts. In considering this case, it should be borne in mind that the Illinois courts recognize and apply the cy pres doctrine very liberally. Because the court in this case

[1] Morristown Trust Co. v. Mayor, et al, Town of Morristown, 91 Atl. 736, 82 N. J. Eq. 521.

covers every phase of the case at bar so well and pointedly we quote fully from the opinion. The facts and pertinent parts of the opinion are as follows:

> "* * * the issue in this case is whether a bequest under the will of David E. Fiske to the Chicago Daily News Fresh Air Fund, a charitable corporation, which the Fund has renounced, should go to the heirs as in the case of intestacy, or should be awarded to some similar charity under the doctrine of cy pres. (p. 311)
>
> * * * * * * * * *
>
> "The court will adopt any reasonable construction of a will rather than hold that the testator intended to die intestate, but if he has overlooked something which he perhaps would have provided for if it had occurred to him, the court cannot guess as to what his disposition might have been. *Pontius* v. *Conrad,* 317 Ill. 241, 148 N. E. 17.
>
> * * * * * * * * *
>
> "In the instant case the testator bequeathed part of his residuary estate to the Chicago Daily News Fresh Air Fund, the plaintiff. By its complaint the court was informed that it declined to take the bequests as it had decided to discontinue its operations. The will of the testator made no provision for such a contingency. *The court has no way of knowing what the testator might have done if he had in mind that the Fund might suspend operations. The Attorney General argues the testator would have directed that the property go to another charity of similar purpose, but this is mere speculation. The courts cannot guess at what provision the testator probably might have made. It is well established that the intention of a testator must be drawn from the language of the will itself. Dahmer* v. *Wensler,* 350 Ill. 23, 182 N. E. 799, 94 A. L. R. 1, and in *Hampton* v. *Dill,* 354 Ill. 415, 420, 188 N. E. 419, 421, it was said, '*the court cannot guess which provision he would have made and read it into his will on the presumption that he would naturally have made such a provision if he had thought of it.*' *LaRocque* v. *Martin,* 344 Ill. 522 ,176 N. E. 734. (p. 311) (Italics ours)

Countless other cases could be cited in support of the above. We believe, however, that the propositions of law set out in the foregoing quotation are so clear and so fundamental that the citation of further cases is unnecessary.

In the instant case about the most that can be said of Ackland's charitable intention as set out in his will is that Duke University is an educational institution and from that fact a general charitable intent should be inferred. In this connection, we think it pertinent to again refer to the well-settled rule that a general charitable intent cannot be deduced from the sole fact that the organization named in the will is engaged in a particular charitable work.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari is within the provisions of Rule 38 of this Court; that the problems presented are of widespread importance in which this Court should exercise its power of review to settle the legal questions involved. It is, therefore, respectfully urged that a writ of certiorari should be granted.

FRANK J. HOGAN,
JAMES C. ROGERS,
Counsel for Petitioners.

AUSTIN W. SCOTT,
ARTHUR J. PHELAN,
LESTER COHEN,
Of Counsel.